LIBRARY
SUPREME COURT, U. S.

In The Supreme Court of The United States

OCTOBER TERM, 1973

No. 73-862

PETER J. LIMONE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ALFRED PAUL FARESE
449 Broadway
Everett, Massachusetts 02149
Attorney for Petitioner

SUBJECT INDEX

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions 2

Statement of the Case 3

Reasons for Granting Certiorari 6

1. The decision of the Court of Appeals that the petitioner's argument with respect to his susceptibility for future civil suit brought on account of his immunized testimony before the grand jury was without merit is contrary to certain provisions of the United States Constitution 6

2. The decision of the Court of Appeals that the petitioner would be afforded the full protection guaranteed by the Fifth Amendment with respect to statements made prior to the Court's grant of immunity is contrary to the mandate of the Fifth Amendment 10

Conclusion 19

Appendix (Opinion and Judgment of Court of Appeals) ..... App. 1

TABLE OF CITATIONS

Cases

Page

In re Baldinger, 356 F.Supp. 153 (C.D. Cal. 1973)..13, 17,18
Brown v. *Walker*, 161 U.S. 591 (1896) 10
Counselman v. *Hitchcock*, 142 U.S. 547 (1892) 14
Glickstein v. *United States*, 222 U.S. 139 (1911) 14
Kastigar v. *United States*, 406 U.S. 441 (1972) 10, 17, 18
Malloy v. *Hogan*, 378 U.S. 1 (1964) 15
Neely v. *United States*, 300 F.2d 67 (9th Cir. 1915), *cert. denied*, 369 U.S. 864 (1962) 12
Piccirillo v. *New York*, 400 U.S. 548 (1971) 14
Ullmann v. *United States*, 350 U.S. 422 (1956) 10
United States v. *Allen*, 193 F.Supp. 954 (S.D. Cal. 1961) 18
United States v. *Adler*, 380 F.2d 917 (2nd Cir.), *cert. denied*, 389 U.S. 1006 (1967) 12, 13
United States v. *Alter*, No. 73-1121 (9th Cir., July 23, 1973) 15, 16
United States v. *Bedore*, 455 F.2d 1109 (9th Cir. 1972) 12
United States v. *Gilliland*, 312 U.S. 86 (1941) 11
United States v. *Egenberg*, 441 F.2d 441 (2nd Cir.), *cert. denied*, 404 U.S. 994 (1971) 12
United States v. *John Doe*, 73-1660, (3rd Cir., Sept. 5, 1973) 15,17

Statutes and U. S. Constitution

Mass. Gen. Laws ch. 137, §§ 1-2 8
Mass. Gen. Laws ch. 233, §§ 20C-20I 14
18 U.S.C. § 1001 11
18 U.S.C. § 6002 ..... 2, 10, 16
28 U.S.C. § 1826 4
U. S. Const. amend. V 2, 8

MISCELLANEOUS

Page

Annot., *Incriminating Disclosures — Immunity,* 53 A.L.R.2d 1030, 1032 (1957) 15

Note, *The Federal Witness Immunity Acts In Theory And Practice; Treading The Constitutional Tightrope,* 72 Yale L.J. 1568, 1611 (1963) 15

Wendel, *Compulsory Immunity Legislation And The Fish Amendment Privilege; New Developments And New Confusion,* 10 St. Louis U.L.J. 327, 371 (1966).. 15

8 Wigmore, Evidence, § 2281 (McNaughton rev. 1961) 14

In The Supreme Court of The United States

OCTOBER TERM, 1973

No. .....

PETER J. LIMONE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Peter J. Limone respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 1, 1973.

OPINION BELOW

A written opinion was issued on November 1, 1973, but is not yet reported. A copy of this opinion is attached as the Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1973. No petition for rehearing was filed. This petition for certiorari is filed within thirty (30) days of the date of entry of the judgment of the court of appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in finding that the petitioner would not be subject to the harassment of a future civil suit brought as a result of his immunized testimony.

2. Whether the court of appeals erred in finding that the petitioner would be afforded the full protection provided by the Fifth Amendment with respect to statements made by him prior to the district court's grant of immunity.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. CONST. amend. V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

THE USE IMMUNITY STATUTE; UNITED STATES CODE, TITLE 18:

> "§ 6002 Immunity generally.
>
> Whenever a witness refuses, *on the basis of his privilege against self incrimination,* to testify or provide

other information in a proceeding before or ancillary to —

(1) A court or grand jury of the United States, . . . the witness may not refuse to comply with the order *on the basis of his privilege against self-incrimination;* but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, *except a prosecution for perjury, giving a false statement,* or otherwise failing to comply with the order." (Emphasis added.)

STATEMENT OF THE CASE

On December 19, 1972, Peter Limone was subpoenaed to appear before a United States Special Grand Jury for the District of Massachusetts. He refused to answer any questions asked of him on the grounds that the answers to these questions would violate his privileges under the Fourth, Fifth, Sixth and Ninth Amendments.

On August 9, 1973, the United States applied to the district court for a grant of immunity for Mr. Limone pursuant to the provisions of 18 U.S.C. §§ 6002-6003. On August 10, 1973, an order was issued by the district court, Freedman, J., ordering the witness to testify in accordance with the provisions of 18 U.S.C. §§ 6002-6003.

The order itself states in pertinent part that:

"The Court hereby grants Peter James Limone immunity from prosecution in that no testimony or other

> information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness Peter James Limone in any criminal case except a prosecution for perjury, *giving a false statement* or otherwise failing to comply with this order." (Emphasis added.)

This part of the court's order is taken verbatim from 18 U.S.C. § 6002.

On August 15, 1973, the witness appeared before the special grand jury and was advised of the aforementioned order of immunity. The witness persisted in his refusal to answer any and all questions propounded to him for constitutional reasons. On that same day, the Government petitioned the court, pursuant to 28 U.S.C. § 1826, for an order that would hold the witness in contempt. 28 U.S.C. § 1826 reads in pertinent part that:

> "Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses *without just cause shown* to comply with an order of the court to testify or provide other information . . . , the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. . . .
>
> No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. . . ." (Emphasis added.)

On October 15, 1973, a hearing was held before the court, Freedman, J. and after argument and submission of memoranda, the proceedings were continued to October 23, 1973. The court stated that the witness could "change his mind" and "voluntarily" testify before the grand jury.

The witness did not appear before the special grand jury and on October 24, after the hearing, the district court signed a contempt order. Execution of this order was stayed for a period of fourteen days, up to November 6, 1973, pending appeal to this Court. The witness then filed a timely notice of appeal.

At the hearing on October 23, 1973, the witness testified that sometime in December, 1972, F.B.I. agents, acting pursuant to a search warrant, entered a lounge on Friend Street in Boston. The agents conducted a search of the building and of an automobile. The agents also questioned the occupants of this building. During this period, several agents questioned the witness and he responded to these questions. The witness could not remember the questions that were asked, the answers that were given, or any information which he voluntarily gave to these agents. An agent testified that this had in fact occurred. He stated that the search and questions concerned gambling in the greater Boston area. He stated that, to his knowledge, the witness had only spoken to him. He did opine that the witness had lied to him.

The witness filed a timely notice of appeal and on November 1, 1973, the Court of Appeals for the First Circuit entered an order dismissing the appeal pursuant to local rule 12. Said rule states in pertinent part that:

> "At any time, on such notice as the Court may order, on motion of appellee or sua sponte, the Court may dis-

miss the appeal or other request for relief or affirm and enforce the judgment or order below if the Court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. . . ."

The court directed that mandate issue forthwith, but its issuance was not to affect the stay of execution due to expire on November 6, 1973, pursuant to the district court order of October 23, 1973. On that same day, November 1, 1973, the government petitioned the district court to revoke the stay of execution of the contempt order signed on October 23, 1973. However, said motion was denied on November 2, 1973 by the court, Freedman, J. On November 2, 1973, petitioner submitted a motion before the court of appeals for a stay of mandate and release on bail pending determination of a writ of certiorari in the Supreme Court of the United States. This motion was denied by the court of appeals on November 5, 1973 and on November 6, the petitioner voluntarily surrendered himself to the United States Marshal. On November 19, 1973, the petitioner submitted a petition for admittance to bail to First Circuit Justice William J. Brennan, Jr. Said petition was denied that same day.

REASONS FOR GRANTING CERTIORARI

The petitioner contends that the court of appeals has decided substantial federal questions contrary to certain fundamental Constitutional principles.

I. THE DECISION OF THE COURT OF APPEALS THAT THE PETITIONER'S ARGUMENT WITH RESPECT TO HIS SUSCEPTIBILITY TO FUTURE CIVIL SUIT BROUGHT ON ACCOUNT OF HIS IMMUNIZED

TESTIMONY BEFORE THE GRAND JURY WAS WITHOUT MERIT IS CONTRARY TO CERTAIN PROVISIONS OF THE UNITED STATES CONSTITUTION.

It is immediately apparent when reading the "Use Immunity Statute," 18 U.S.C. § 6002, that a witness must invoke his privilege against self-incrimination in order to become eligible to receive use and derivative use immunity. That statute states in pertinent part that:

> "Whenever a witness refuses, *on the basis of his privilege against self incrimination* to testify or provide other information in a proceeding before or ancillary to —
>
> (1) A court or grand jury of the United States, . . . the witness may not refuse to comply with the order *on the basis of his privilege against self-incrimination;* but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, *except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*" (Emphasis added.)

The witness queries, however, whether the district court can constitutionally grant a witness immunity if he has not invoked his privilege against self-incrimination when he first appears before the grand jury. The statute is apparently worded so that once the witness invokes his privilege against self-incrimination, the court, if petitioned by the government can supplant the fifth amendment privilege, grant the witness immunity and compel the witness to testify before the grand jury. The testimony thus compelled or any infor-

mation directly or indirectly derived from such testimony cannot be used against the witness in any criminal case. It should be borne in mind, however, that the immunity granted is thus predicated on the initial assertion of the fifth amendment privilege by the witness.

In the instant case, the witness appeared before the special grand jury and *did not* invoke his privilege against self-incrimination but, instead, relied on that part of the fifth amendment which reads as follows: "... nor shall any person be deprived of his life, liberty or property without due proces of law." Nevertheless, the district court, Freedman, J. granted the witness immunity under the statute. The witness contends that the immunity granted is not co-extensive with the letter and spirit of the due process clause of the fifth amendment. This contention is strengthened by the fact that the government has admitted that it is investigating alleged gambling activities in the greater Boston area. Compelling a witness to testify to his knowledge of these activities would therefore expose the witness to a possible civil suit brought pursuant to MASS. GEN. LAWS ch. 137, §§ 1-2. § 1 of the statute states in pertinent part that:

> "Whoever, by playing at cards, dice or other game, or by betting on the sides or hands of those games, loses to a person so playing or betting money or goods, and pays or delivers the same or any part thereof to the winner ... may recover such money or the value of such goods in contract; and if he does not within three months after such loss ... prosecute such action with effect, any other person may sue for and recover in tort treble the value thereof."

§ 2 of the statute provides a similar penalty against the owner, tenant or occupant of a "house or building"

where money or goods are lost "in any form of gaming referred to in the preceding section," with the knowledge or consent of said owner, occupant or tenant.

In the instant case, the Government admits that it is investigating alleged gambling activities in the greater Boston area. If in fact the witness has engaged in any such activity his compelled testimony could be used against him in any civil action under this statute. A grant of immunity could compel a witness to admit his civil liability and thus subject him to possible extensive property loss. In this respect, a court, by issuing an order of immunity, would become a willing participant in the deprivation of a witness' property. A grant of immunity under § 6002, considering the facts of the instant case, would not protect a citizen from deprivation of property without due process of law.

In its memorandum and order the Court of Appeals for the First Circuit emphasized that the petitioner was advancing "speculative consequences, which if realized, [would] fall beyond the scope of 'those sanctions, which generate the fear justifying the privilege', *Ullmann* v. *United States*, 350 U.S. 422, 431 (1956." See p. 1 of Appendix hereto.

However, it is worth noting that the Court's holding in *Ullmann* does not preclude examination of the facts in the instant case. In *Ullmann* v. *United States, supra*, the Court was faced with the question whether any immunity statute, or at least one which does not protect against the disgrace or infamy which may be attendant upon testifying is constitutionally adequate. As in *Brown* v. *Walker*, 161 U.S. 591 (1896), the Court ruled that the consequences are not covered by the privilege, 350 U.S. at 430-431. The more basic question which the petitioner presents in the instant case,

however, is the ability of the district court to confer immunity upon an individual who has not invoked his privilege against self-incrimination. For this is the course that the petitioner has followed in the present proceeding.

Thus *Ullmann* v. *United States, supra,* and *Brown* v. *Walker, supra,* can be distinguished since the Court in both cases based its reasoning and conclusion on the protections afforded an individual's privilege against self-incrimination by various immunity statutes. The petitioner in the instant case contends that the immunity granted is not coterminous with his fifth amendment due process rights.

II. THE DECISION OF THE COURT OF APPEALS THAT THE PETITIONER WOULD BE AFFORDED THE FULL PROTECTION GUARANTEED BY THE FIFTH AMENDMENT WITH RESPECT TO STATEMENTS MADE PRIOR TO THE COURT'S GRANT OF IMMUNITY IS CONTRARY TO THE MANDATE OF THE FIFTH AMENDMENT.

In *Kastigar* v. *United States,* 406 U.S. 441 (1972), the Supreme Court held that the use immunity statute, 18 U.S.C. §§ 6001-6605, facially did not violate the fifth amendment. The use immunity statute was enacted as part of the Organied Crime Control Act of 1970, Pub. L. No. 91-452. 18 U.S.C. § 6002 provides:

> "Whenever a witness refuses, *on the basis of his privilege against self-incrimination, to testify or produce other information* in a *proceeding before or ancillary* to:
>
> (1) a court or grand jury of the United States . . . and the person presiding over the proceedings commu-

> nicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order." (Emphasis added.)

The witness contends that if he is required to testify pursuant to an order of immunity, his fifth amendment rights will be violated, because his testimony before the grand jury could be used against him in a prosecution for making false statements in violation of 18 U.S.C. § 1001. That section states:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully . . . makes any false . . . statements . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

United States v. *Gilliland*, 312 U.S. 86 (1941), was the first case in which the Supreme Court interpreted § 1001 in substantially its present form. The Court determined the Congressional purpose to be:

> ". . . to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction." 312 U.S. at 93.

It is well established that the term "false statement" in § 1001 encompasses statements not made under oath as well as those made under oath. In addition, the term is not restricted to statements required to be made by law or in writing. *United States* v. *Adler*, 380 F.2d 917 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); *Neely* v. *United States*, 300 F.2d 67 (9th Cir.), *cert denied*, 369 U.S. 864 (1962).

In *United States* v. *Bedore*, 455 F.2d 1109 (9th Cir. 1972), the Ninth Circuit characterized the purpose of § 1001:

> "Section 1001 originated more than 100 years ago in a statute drawn to penalize persons who made fraudulent claims for money against the Government. The statute was amended in 1934 to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits in any matter within the jurisdiction of any department or agency of the United States." 455 F.2d at 1110-1111.

The court went on to emphasize that:

> ". . . section 1001 was not intended to reach all false statements made to government agencies and departments, but only those false statements that might support fraudulent claims against the Government, or that *might pervert or corrupt authorized functions of those agencies to whom statements are made.*" 455 F.2d at 1111. (Emphasis added.)

In *U.S.* v. *Egenberg*, 441 F.2d 441 (2d Cir.), *cert. denied*, 404 U.S. 994 (1971), the court held that:

> "In order to convict [for filing or making false statements] the jury need only find that the defendant acted

with reckless disregard of whether a statement was true. . . ." 441 F.2d at 444.

In *United States* v. *Adler, supra,* the court held that statements to an F.B.I. agent not under oath are specifically within the scope of statements prosecutable as false statements. The court stated that the defendant's false statements to an F.B.I. agent that he had been required to pay bribes to government officials, which led to an F.B.I. investigation, was a matter within the jurisdiction of any department or agency of the United States within the meaning of § 1001.

Under the holdings of *Adler, Neely, Bedore* and *Egenberg,* it is clear that, in the instant case, the witness' past statements, if false, or made with reckless disregard of the truth, constitute false statements under § 1001 which may have "perverted or corrupted the authorized function" of the governmental agency to whose representatives the statements were made.

In a case somewhat analagous to the one at bar, *In re Baldinger,* 356 F.Supp. 153 (C.D. Cal. 1973), the court held that where a witness had made at least five oral statements to F.B.I. agents, where she had demonstrated to the court that she could not remember what the statements contained and where the Government had convened a grand jury and applied to the court for an order of immunity pursuant to 18 U.S.C. §§ 6001-6005, the proposed immunity order did not provide immunity co-extensive with the guarantees of the fifth amendment. The court found that the witness' compelled testimony could be used against her in a prosecution for giving false statements prior to the grant of immunity.

Since the fifth amendment protects a person from being forced to incriminate himself with respect to crimes committed in the past, *Glickstein* v. *United States*, 222 U.S. 139 (1911), *Piccirillo* v. *New York*, 400 U.S. 548 (1971), the court reasoned that the immunity order did not provide immunity co-extensive with the guarantees of the fifth amendment.

It is thus clear that for use immunity to be co-extensive with the guarantees of the fifth amendment, the immunity granted must protect the witness from prosecution for acts of perjury or false statements committed *prior* to the grant of immunity. From a perusal of the facts in the instant case and the very statute itself, one can immediately ascertain that this constitutional protection is lacking. Looking at the statute itself, one is immediately confronted with the total absence of language specifically restricting perjury and false statements to those committed during the compelled testimony. This absence contrasts sharply with its inclusion in the Massachusetts "*Transactional Immunity Statute*" MASS. GEN. LAWS ch. 233, §§ 20C-20I, and *The Immunity Act of 1954*, Act of August 20, 1954, C. 769, § 1. Both of the above statutes contained nearly identical language. . . . "no testimony shall be used except in a prosecution for perjury or contempt *committed while giving testimony or producing evidence under compulsion* as provided in this section." (Emphasis added.)

Ever since *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) virtually every federal immunity statute has provided for absolute immunity against prosecution in language which has become known as transactional immunity "for or on account of any transaction matter or thing concerning which the witness is compelled to testify or produce evidence." See *Ullmann* v. *United States, supra;* 8 Wigmore, Evidence,

§ 2281 (McNaughton rev. 1961); Wendel, *Compulsory Immunity Legislation And The Fifth Amendment Privilege; New Developments and New Confusion*, 10 St. Louis U.L.J. 327, 371 (1966); Note, *The Federal Witness Immunity Acts In Theory And Practice; Treading The Constitutional Tightrope*, 72 Yale L.J. 1568, 1611 (1963).

Likewise, even prior to *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the vast majority of state cases adhered to the transactional immunity requirement. Annot., *Incriminating Disclosures—Immunity*, 53 A.L.R.2d 1030, 1032 (1957). Moreover, in all past and present state and federal immunity statutes a specific proscription was incorporated within the body of each statute limiting prosecutions for perjury or giving false statements to those given while testifying before the grand jury. The present Immunity Statute, 18 U.S.C. § 6002 is particularly unusual since it lacks this limiting clause which was a common characteristic of its predecessors.

Since the statute fails to afford constitutional protection for past incriminating statements and for past false statements given to governmental officials thus allowing the use of "immunized testimony" in a prosecution for false statements pursuant to 18 U.S.C. § 1001, the protection given to an immunized witness is at best ephemeral. In the instant case, if the witness' prior statements are false, he is liable to prosecution under § 1001.

The court of appeals in the instant case has held that the witness is given immunity from prosecution under § 1001. In support of its holding, the court cites, *United States* v. *Alter*, No. 73-1121 (9th Cir., July 23, 1973) and *United States* v. *John Doe*, No. 73-1660 (3rd Cir., September 5, 1973).

The court in *Alter* held that the witness' refusal to comply with the immunity order issued pursuant to 18 U.S.C. § 6002, was without foundation. Like the witness in the present case, Alter had argued that the exception built into § 6002 would expose him to potential prosecution for violating 18 U.S.C. § 1001 (false statements to a government official or agency) if the statement given to the F.B.I. a year before his grand jury appearance should prove to be false.

At page 16 the court stated:

> "We accept the Government's construction of Section 6002 as it applies to Alter:
>
> 'The phrase beginning with "or otherwise" as underlined above, modifies the meaning of the preceding quoted phrase beginning with except. The concluding phrase indicates that the compelled testimony may be used in prosecutions for giving false statements in response to the command to testify. But for the exception quoted here, all testimony given in compliance with the command to testify cannot be used, as prescribed under the preceding language of the immunity grant. . . . The testimony which appellant might have given could not be used against him in any prosecution for any false statements made to anyone outside of the Grand Jury.' "

Further, the court stated, at page 16, that:

> "Immunity prohibits the prosecutorial authorities from using the compelled testimony in *any* respect. . . . Accordingly, in the event of a prosecution for making a false statement to the F.B.I., *none* of the Government's

proof could be based upon direct or indirect evidence gained by virtue of Alter's immunized grand jury testimony."

In *Doe*, the court cited *Alter* and concluded that "Testimony given begore a Grand Jury after a grant of immunity under 18 U.S.C. § 6002 may be used only in a prosecution for falsehoods uttered in response to the command to testify."; slip opinion at 3.

It should be remembered that *Kastigar* v. *United States, supra*, does not foreclose inquiry into the facts of the instant case. The Supreme Court simply held that, facially, the "Use Immunity Statute" did not violate the fifth amendment. The issue before this Court is the interpretation of that part of the statute which reads: ". . . except a prosecution for perjury, giving a false statement. . . ."

The First, Third and Ninth Circuits have held that the immunity granted precludes the use of the compelled testimony in a false statement prosecution because of their interpretation that the false statements "exception" refers only to false statements given while under the grant of immunity. The witness contends that this interpretation is highly questionable and that the courts have misinterpreted the plain meaning of The Use Immunity Statute.

In *Baldinger, supra*, the court noted three factors which required it to conclude that the "false statement" exception could only refer to a prosecution for false statement given *prior* to the grant of immunity. First, the court noted that "every previous immunity statute known to the court contains specific language restricting the exclusion from immunity to perjury committed during the compelled testimony." 356 F.Supp. at 163. The court further stated:

> "... If Congress had intended to restrict the exception from immunity to prosecutions for perjury or false statements committed before the grand jury, it could easily have done so, as it had consistently in previous immunity statutes. Confronted with specific language in every previous immunity statute known to the court restricting the exception from immunity to perjury committed in the course of compelled testimony, and the contrasting absence of any such specific language in § 6002, the court is bound to interpret the use immunity statute according to the plain meaning of its terms." 356 F.Supp. at 164.

Second, the court noted that the false statement exception can *only* refer to *prior* false statements. The court cited *United States* v. *Allen*, 193 F.Supp. 954 (S.D. Cal. 1961), which held that a federal grand jury is not an agency of the United States within the meaning of § 1001.

Third, the court noted at pages 166-167 that to accept the Government's argument would require the court to engage in legislation, a function which belongs to the Congress and not the Judiciary.

The witness contends that any other interpretation of legislative intent is, at best, highly questionable. The court in *Alter* reasoned that the words "or otherwise" in the statute indicates that Congress intended that only false statements given to the grand jury are prosecutable. This reasoning is tenuous in light of the above discussion. The court also reasoned that *Kastigar, supra,* buttresses this conclusion since the grant of immunity "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect....", citing *Kastigar,* 406 U.S. at 453.

The court, however, seems to overlook the fact that compelled testimony cannot be *used* against a person, *except* in a prosecution for perjury, giving a false statement or otherwise failing to comply with the order. Thus, the *Kastigar* decision adds little to aid the court in its determination of legislative intent.

The order of immunity in the case at bar is not co-extensive with the guarantees of the fifth amendment. The order states that the witness shall not be exempted from a prosecution for perjury, giving a false statement or otherwise failing to comply with the order. A clause restricting the use of such compelled testimony to prosecutions for false statements given while testifying is absent. If this Court interprets the false statement exception of § 6002 to mean only false statements given to the grand jury, the Court will be engaging in judicial legislation, a function which belongs to Congress alone.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

ALFRED PAUL FARESE
with whom John C. McBride
was on petition for
petitioner Limone

APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 73-1344.

IN RE
PETER JAMES LIMONE,
APPELLANT.

Before COFFIN, *Chief Judge,*
ALDRICH AND CAMPBELL, *Circuit Judges.*

MEMORANDUM AND ORDER

Entered November 1, 1973

Appellant appeals from an order of the district court holding him in contempt for failure to testify before a grand jury despite a grant of immunity given pursuant to 18 U.S.C. §§ 6002-6003. Appellant concedes that the issue of the facial constitutionality of the federal immunity statute has been settled by *Kastigar* v. *United States,* 406 U.S. 441 (1972), but contends that as applied here the grant of immunity fails to protect fully his Fifth Amendment privilege against self-incrimination.

His first argument has to do with the possibility that he may be subjected to civil liability as a result of his grand

jury testimony. He asks us to contemplate the possibility that testimony which he gives to the grand jury might, despite the secrecy of such a proceeding, become the basis for the assertion of some future civil suit against him. Such speculative consequences, even if realized, fall beyond the scope of "those sanctions which generate the fear justifying the privilege", *Ullmann* v. *United States*, 350 U.S. 422, 431 (1956).

As to appellant's second argument, that the exception contained in § 6002 allowing prosecution for "perjury, giving a false statement or otherwise failing to comply with the order" might leave him open to prosecution if his grand jury testimony conflicts with prior statements which he has given to the federal agents, and thus might lead to criminal liability resulting from the earlier statement. Although this argument was accepted in *In re Baldinger*, 356 F.Supp. 153 (C.D. Cal. 1973), it was rejected in *United States* v. *Alter*, No. 73-1121 (9th Cir. July 23, 1973), and in *United States* v. *John Doe*, No. 73-1660 (3rd Cir. Sept. 5, 1973). The later two cases interpreted § 6002 so as to limit its exception to allow only prosecutions for offenses committed before the grand jury, and not for false statements or perjury committed outside of the grand jury proceedings. We accept the analysis of the two courts of appeals and therefore find no merit to appellant's argument.

The appeal is dismissed under our rule 12. Mandate is to issue forthwith but such inssuance is not to affect the stay of execution due to expire on November 6, 1973, under the district court order of October 23, 1973.

By the Court:

/s/ DANA H. GALLUP
Clerk.

LIBRARY
SUPREME COURT, U. S.

No. 73-862

FILED
FEB 11 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

PETER J. LIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-862

PETER J. LIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was held in civil contempt for refusing to answer questions before a special United States grand jury for the District of Massachusetts after he had been granted use immunity pursuant to 18 U.S.C. 6002-6003. The court of appeals dismissed his appeal (Pet. App.).

Petitioner contends that requiring him to testify before the grand jury would deprive him of property

without due process of law, because testimony about his gambling activities could subject him to civil liability for his gambling winnings under Mass. Gen. Laws ch. 137, §§ 1, 2 (Pet. 6-10). He also contends (Pet. 10-19) that requiring him to testify would violate his privilege against self-incrimination, because the exception in 18 U.S.C. 6002 allowing prosecution for "perjury, giving a false statement, or otherwise failing to comply with the order" might subject him to prosecution for giving false statements to federal agents. Each of these contentions was properly rejected by the court of appeals, on whose opinion we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 532161 176